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In the Supreme Court of the United States

OCTOBER TERM, 1923.

THOMAS N. MILLER, AS ALIEN PROPERTY CUSTODIAN, AND FRANK WHITE, AS TREASURER OF THE UNITED STATES OF AMERICA, appellants, *v.* FREDERIC Y. ROBERTSON.	No. 273.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

REPLY BRIEF ON BEHALF OF THE ALIEN PROPERTY CUSTODIAN AND TREASURER OF THE UNITED STATES, APPELLANTS.

Counsel, in the brief on behalf of the appellee, have advanced with great learning and detail every possible argument which, apparently, can be made in support of the decree herein. The very fullness with which their brief covers the matters involved herein, is doubtless the cause of its treating many questions of fact and propositions of law concerning which there is virtually no dispute. This situation leads us to believe that a comparatively short reply is advisable, in

which we will seek to bring into sharp relief the operative facts and disputed questions of law.

Facts.

We have no desire to question or criticize that part of the brief on behalf of appellee which is designated "The Facts". However, we feel that the court should bear in mind that the following important facts were proven beyond dispute:

(1) When the alleged contract in suit was entered into, the Mammoth Copper Mining Company had no established zinc mine (Rec., pp. 139-140). Pages 664-665 of the Record, relied upon by counsel, contain no *specific* "finding" that the Mammoth Copper Mining Company had an established zinc mine when this "contract" was entered into. The Mammoth Copper Mining Company, at that time, did not even have an effective means of sorting zinc ore, a process which is essential in the production of such ore (Rec., pp. 147-148). This was because its contemplated picking plant (Rec., p. 50) was not completed until March 5, 1915 (Rec., p. 146), several months after the execution of the alleged agreement (Rec., p. 120). (2) It cannot be disputed but that this "contract" contained the words "shipped from", —which modified the words "total production",— so that it read "total production of zinc crude ore shipped from its properties" (Rec., p. 49). (3) Furthermore, Metcalf, after this alleged contract had been made, actually sent the telegrams stating that the Mammoth Company's shipments of zinc ore would depend altogether on the market price

of spelter (Rec., pp. 613-614). The record also shows that Metcalf was the individual who had general charge of the Mammoth Copper Mining Company and also was the person whose consent was ordinarily secured before any contracts were executed on behalf of the Mammoth Company (Rec., pp. 141-155-188-189 and 191). (5) It further appears that, when he was called as a witness, Metcalf testified in a manner which confirmed the statements of his telegrams, as follows (Rec., pp. 158-159):

> "R.D.Q. 210. Counsel has suggested a line of questions, Mr. Metcalf. Mr. Salinger's letter about the quantities there reads:
>
> The high level of the spelter market should be a great incentive for your Company to ship as much as possible. Will you kindly let me know what you figure your February production to be?"

and your reply was:

> "Would say that we are at present building a new zinc sorting plant, which should be in shape for operation the latter part of February. It is, however, unlikely that it will be operating soon enough to make any material increase in our February production. Our March production will be considerably increased."
>
> (Fol. 329.) At the time that you wrote that letter to him, January 27, 1915, it appears here that your shipments, by dry weight in December and January were in the neighborhood of about forty tons a week (referring to Schedule attached to Exhibit No. 31). You were shipping about 40 tons a week, were you not?

A. Yes.

RDQ. 211. And that would be 160 tons a month, and two or three times that shipment would be a considerable increase, would it not?

A. Yes.

RDQ. 212. And you do not mean us to understand for one moment, do you, that this picking plant, contemplated away back in the preceding year, plans for which were drawn in September or October anyhow that the enlargement of that picking plant was stimulated. Your capacity was stimulated, by Salinger's letter asking for increased ore, do you?

A. I do not know that I understand that question. I can explain the situation, if you wish me to.

RDQ. 213. Well, Mr. Salinger's letter did not make the slightest conceivable change in the sorting or picking plant did it?

A. No.

RDQ. 214. And it is true that if at any time during the life of this contract now in suit, if the price of spelter had gone so low that it would not have been profitable for the Mammoth to have produced this zinc ore, they would not have produced and shipped it, would they?

A. That is probably true.

* * * * * * * * *

RDQ. 220. Now, would you have shipped if the price of spelter—would you have had any product if the price of spelter got so low that it would not have been profitable to have mined it and shipped it?

A. No, there would have been practically no product."

We submit that the foregoing facts are especially important in determining whether any valid contract was ever entered into between the Mammoth Copper Mining Company and Beer, Sondheimer & Co.; and that unless each and every one of them be disregarded, this court should not affirm the decree of the Circuit Court of Appeals on the merits.

ARGUMENT.

I.

As to the authorities defining the word "debt."

Doubtless, the word "debt" may have in many instances, as wide a meaning as that for which counsel contend. The word "debt", in certain connections, may be meant to cover any claim of a financial nature. But the same authorities which so hold, also denote that the word "debt," for this very reason, should be interpreted with close regard to its context and to the connection in which it is used.

Inasmuch as the question before this Court is with what meaning Congress used the word "debt" in this particular statute, the Trading-with-the-Enemy Act, we cannot agree to the proposition that decisions interpreting its meaning, under other and quite different statutes, are important. For this reason we have not brought to the attention of this Court the numerous decisions,

under various statutes, which hold that a claim for damages for breach of an executory contract, is not a "debt". The following quotation from *Dunn* v. *Neustadtl*, 129 N. Y. Supp. 161, 163-4, will serve to indicate the trend of such authority:

> "Perhaps no better statement of the law can be found than that set forth in Vernon *v.* Palmer, 48 N. Y. Super. Ct. 231, 235:
>
> > 'The true doctrine is that a debt is contracted when, in consideration of value received by the corporation, a payment is to be made, no matter whether at once or at a future period. The mere execution of a contract between the seller and the corporation, to the effect that the former shall deliver, and that the latter should receive and pay for, personal property at a future day, does not of itself amount to the contraction of a debt within the meaning of the statute, but upon the delivery of the property according to the contract the debt springs into existence. This must be so upon principle, and it is in accord with all the reported cases, and especially with the reasoning in Garrison *v.* Howe, 17 N. Y. 458; Whitney Arms Co. *v.* Barlow, 63 N. Y. 62 (20 Am. Rep. 504), and s. c., 68 N. Y. 34'." * * *
>
> "In accord with that doctrine is the case of McIntyre *v.* Strong, 48 N. Y. Super. Ct. 127, affirmed 94 N. Y. 648, where a stockholder personally liable for all debts and contracts made by the company but not for any debt which is not to be paid within two years from the time the debt is contracted was held liable only for instalments due under a lease within two years of the time when the lease is made.

> There seems to be no doubt that the courts are not inclined to consider a liability for breach of an executory contract a debt. Hill *v.* Weidinger, 110 App. Div. 683, 97 N. Y. Supp. 473; Walla Walla City *v.* Walla Walla Water Co., 172 U. S. 1, 19 Sup. Ct. 77, 43 L. Ed. 341; Matter of Roth & Appell (Bankruptcy), 181 Fed. 667, 104 C. C. A. 649."

It is important, however, to determine what the word "debt" meant at common law, for the reasons given in our principal brief, and we submit that, after all has been said, it is still clear that the common law did not classify a claim for damages for breach of an executory contract as a "debt".

We do not wish to go into a lengthy discussion of early English authorities. But we respectfully refer the Court, if it wishes to investigate the matter fully, to see, in addition to the cases cited by our learned opponents, such decisions as *Young* v. *Ashburnham* (1588, C. P.), 3 Leon. 161; *Johnson* v. *Morgan* (1598), Cro. Eliz. 758, 78 Eng. Repr. 989; *Edgecomb* v. *Dee* (1681, C. P.), Vaughan 89, 101; *Sanders* v. *Marke* (1696, K. B.), 3 Lev. 429; and such text-writers as 2 Pollock & Maitland, *History of the English Law* (1895), 208; 2 Holdsworth, *History of the English Law* (3 ed. 1923), 453, and Ames, *Lectures on Legal History* (1913), 89. These authorities, as well as the cases and precedents cited and discussed in our principal brief, at pages 35 to 44, show that a *quid pro quo* (that is, some executed consideration, other than a promise), or an express promise to pay a sum certain, or an obligation to pay a sum certain such

as is imposed by a tax, a fine or a penalty, was necessary, and is necessary, to support a common law action of debt.

In fact, the common law cases cited by our learned opponents, go no further; they do not show a claim for damages from breach of an executory contract, commercial or otherwise, was ever considered a "debt" at common law.

Summarizing briefly the appellees' authorities, which are found on pages 50 to 55 of the brief, it appears that, although *Walker* v. *Witter* (1778, K. B.), 1 Doug. 1, 99 Eng. Repr. 1, contains the *dictum* by Lord Mansfield, quoted by our learned opponents, the case itself merely turned upon the possibility of fluctuation in the exchange value of Jamaica currency. The question raised by that point was not a novel one, even at that time, for as early as 1605, in *Draper* v. *Rastal,* Cro. Jac. 88, the King's Bench had emphatically decided that a promise to pay in foreign money involved a sum certain, and that debt would lie, if the declaration demanded its value in English coin.

In *Fairley* v. *Briant,* 3 Ad. & E. 839, 111 Eng. Repr. 632, the covenants of the lease in question provided expressly that for every acre the tenant cultivated contrary to his prior agreements, a further *"rent"* should be paid, stating the amount, "as and for liquidated sums by way of settled damages".

The next authority, aside from certain comments on *Blackstone,* wherein the editor, Jones, apparently disagrees with the author (see 3 Blackstone's Commentaries, 154), is *United States* v. *Chamberlin,* 219 U. S. 250. That was merely an

action to recover a stamp tax, surely involving a sum certain. *Mahaffey* v. *Petty*, 1 Ga. 261, was an action to recover for services rendered, where, of course, the consideration was executed. Whatever was said in the Tennessee case of *Hickman* v. *Searey's Executors*, 9 Yerg. (Tenn.), 47, an action to recover money laid out and expended on behalf of defendant, must be considered in connection with the following decision of the same Court in *Thompson* v. *French*, 10 Yerg. (Tenn.), 452, which laid down the proposition that where the consideration was executed, debt would ordinarily lie, but where the contract was executory, debt would never lie.

In *Huber* v. *Burke*, 11 Serg. & Rawle (26 Pa.) 238, the action appears to have been to recover "the penalty in articles of agreement" relating to a sale of real estate. The court held that a judgment for the penalty, viz: $11,000, could be recovered in an action of debt, but that execution should issue only for such damages as plaintiff proved that he had suffered upon a writ of inquiry as to the damages. The case is one of those peculiar decisions which were made in cases arising out of contracts concerning the sale of real estate in states where the courts possessed, at the time, no equity jurisdiction. (See p. 245)

Concerning the other authorities cited by counsel, a few words will suffice to show that none of them involved a claim for damages for breach of an executory contract.

Stockwell v. *United States*, 80 U. S. (13 Wall.), 531. Action to recover forfeitures and penalties.

Mills v. *Scott*, 99 U. S. 25, discussed on page 34 of our principal brief, in connection with *Carroll et al* v. *Green et al*, 92 U. S. 509.

United States v. *Lyman*, 26 Fed. Cas. 15647, p. 1024. Action to recover customs duties.

United States v. *Colt*, 25 Fed. Cas. 14839, p. 581. Debt upon an embargo bond. See our principal brief, p. 34.

Union Iron Co. v. *Pierce*, 24 Fed. Cas. 14367, p. 583. Action upon corporate promissory note.

Dillingham v. *Skein*, 7 Fed. Cas. 3912a, p. 707. Action upon an open account for goods sold and delivered.

People v. *Dimmer*, 274 Ill. 637, 112 N. E. 934. Action to recover fines.

Norris v. *School District*, 12 Me. 293, 297. Plaintiff recovered reasonable worth of a school building already constructed.

Dalton v. *Callahan* (Me.) 119 Atl. 380. Action for balance due on purchase price of real estate.

Katzenstein v. *Raleigh etc. R. Co.*, 84 N. C. 688. Action for a statutory penalty.

Planters Bank v. *Galloway*, 11 Humph. (Tenn.) 341. Action on a bill of exchange for $1500.00, by an indorsee against the acceptor.

Russell v. *Louisville etc R. Co.*, 93 Va. 322. Action on the case for a penalty. Held that "case" was the wrong remedy, because "the verdict does not sound in damages" and "the recov-

ery is not measured by the damages sustained". *Dictum,* that an action on the case is the remedy where damages are sought to be recovered, but that debt lies only for sums certain.

The next few pages of the brief, under a subheading to the effect that the claim of the appellee herein is a common law debt, contain re-citations of *Mills* v. *Scott, supra, Hickman* v. *Searey's Executor's, supra,* and *Norris* v. *School District, supra;* also *Ingledew* v. *Cripps,* 2 Ld. Raym. 814, 92 Eng. Repr. 43, where nothing was said nor decided about a claim for damages for breach of an executory contract. The consideration there had been executed, the wood in question had been delivered.

We do not dispute the common law has been extended so that debt may lie upon a *quantum meruit* or *quantum valebat,* a proposition set forth on pages 57 to 58 of appellee's brief. Our contention is not that the calling of a jury to decide how much was owing to plaintiff deprives, *ipso facto,* the claim of its character of a debt. But what we have contended and do contend is that there is no common law authority to show that the word "debt" covers or includes those claims for *damages* which arise upon the breach of an executory contract of sale, or other executory contract.

Even the other recent decisions under the Trading-with-the-Enemy Act, cited and discussed by counsel on pages 66 to 68 of appellee's brief, do not hold that a claim like that of the plaintiff's is a debt. The claims passed upon in those cases and held to be debts, were all claims in the nature

of a *quantum meruit* for services rendered. The *W. S. Tyler Co.* case, discussed on pages 47 to 50 of our main brief, is the *only* other reported decision under this Act where the suit was brought to *recover damages* for breach of a contract, and *it* held that such a claim was *not* a debt.

II.

The purpose of Section 9, as gathered not only from the language used, but also from the general situation with which Congress was called to deal when the statute was passed, shows that no such claims as that of the plaintiff-appellee were intended to be included or covered thereby.

The context, in which the word "debt" appears in the section under consideration, closely follows the words "interest, right or title in any money or other property". The significance of such language, indicating, as it does, an intention to use "debt" in its strict sense,—such as lawyers understand it,—has been set forth in our principal brief, on pages 47 to 52.

Let us also consider the purpose and intent of Congress, in view of the situation which it was called upon to meet when creating the office of Alien Property Custodian and defining his powers.

It is almost unnecessary to recall the condition of affairs which existed when the Act was passed in October, 1917; how large and exten-

sive the properties of alien enemies in this country were; how many Germans and other enemy individuals were still in the country; how many had fled the country, leaving a great aggregate of tangible and intangible property behind them; and how many, through agents or otherwise, were the owners of large interests in the United States.

Congress felt the necessity of doing something about this situation, with a view toward getting the control and management of these large interests away from hostile hands.

Congress could have confiscated all this enemy property. But such a "ruthless" procedure in regard to non-combatants did not appeal to it, and was not in conformity with American ideas.

So Congress decided that the Government should secure this property and appointed a common law trustee (Sec. 12) to take over the custody and control of it. In considering the meaning of an amendment to Sec. 9 of this Act, the Court of Appeals (D. C.), in *Banco Mexicano* v. *Deutsche Bank,* 289 Fed. 924, defined the Congressional purpose and policy behind the statute in question, as follows, at page 927:

> "The original purpose of the Trading with the Enemy Act was to cripple Germany and Austria-Hungary, and to deprive them as far as possible of the money and means to carry on the war. It was, however, the expressed policy of the United States not to confiscate or expropriate the property of the enemy; and it was likewise the policy to respect the interest, right, or title of any persons other than Germans and Austrians to money, property, and claims which had

come into the possession of the Alien Property Custodian . . . ."

In view of the fact that such a large and diversified amount of property was to be taken over by the Government, Congress foresaw that mistakes would be made in the hurry and excitement of war time. The property of some who were not enemies might be unjustly seized. Wherefore, it enacted Section 9, with the obvious intent, as was printed out in the opinion in the *Banco Mexicano* case, of allowing any person who was not an enemy or ally of an enemy, and who claimed title to, or an interest in, any of such property, to recover it back, if he filed and proved his claim, as provided. If the President, or his appointee, did not pass upon the claim, then the claimant could commence an equity suit, where with the least possible delay and without the intervention of a jury, the court could pass upon the question.

Of course, many, if not most of the enemy aliens had left the country and could not be present in person to defend the claims which non-enemies might make, but the Government, represented by the Alien Property Custodian or the Treasurer of the United States, or both, was obliged to be made a party defendant to such suits. After all, then, the measures which Section 9 embodies and enacts were fair to all concerned, if the construction for which we contend be given to it. It is fair to the alien enemies, for their property was not confiscated and could not be reached without some defense being made on their behalf, and it is fair to

non-enemies whose property had been mistakenly and wrongfully seized.

Title to real property, and most frequently title to bonds or to stocks and other intangibles, is proved by written evidence, and involves questions of law rather than of fact. The disputed fact in such cases would be whether the deed, assignment or bill of sale was or was not genuine.

But Congress also recognized and provided for the possibility that many citizens or other friendly persons would be in the possession of notes, bonds or other express promises to pay money which the enemy aliens, whose property had been seized, had made or executed. There was no reason why such persons should not be allowed to come in on the same basis as those who claimed title to or an interest in the seized property. In those cases also the question of fact would be whether the German had made the note, endorsed the check, accepted the bill, or promised to pay a fixed price for the goods sold to him and accepted by him. Thus far, and no further, we submit, Congress meant to go when it provided that "debts" owed to non-enemies could be collected out of the seized property. But, as we understand our learned opponents, they contend that the word "debt", which in its ordinary legal acceptation has a rather restricted meaning, should, in this Act, be held to mean any claim whatsoever arising out of a commercial transaction.

If this broad and unwarranted definition be adopted, the Act might almost as well have confiscated the property of the enemy aliens. In this particular case at bar, the Custodian was, by rea-

son of unique circumstances, able to defend the action and to secure witnesses with knowledge of the facts. But ordinarily and in the usual course of events the custodian could have no chance of procuring requisite knowledge and competent witnesses familiar with the facts. The Alien Property Custodian surely would not be in a position to defend an action for damages for breach of contract intelligently or adequately without any opportunity to consult with the absent defendant, who, it is perfectly obvious, could not come here from Germany during the war to present a defense.

The result of the allowance of such claims, in general, would work out an injustice not only to the United States and to the *cestuis que trustent*, the alien enemies, but to the non-enemies and citizens who were owners of "debts" in the strict sense of that word. A person who had a large unliquidated claim, which the Custodian would be in no position to defend properly, might secure a judgment which would require the payment to him of such a large sum out of the property seized, that those creditors with liquidated debts would be greatly prejudiced.

These considerations are all to be swept aside if the interpretation of the word "debts", urged by counsel, be adopted; and Congress, which evidently intended to do the fair thing by these non-combatant aliens, is to be held to have intended the contrary because under the National Bankruptcy Act and under various state attachment statutes, etc., the word "debt" has been given a very broad meaning.

The strongest basis for their argument is this: that it would be unfair to non-enemies with claims similar to plaintiff's, to hold that Congress had placed the alien's property in the hands of the Custodian, beyond reach of state attachment laws, and then provided that one whose claim was based upon the breach of an executory contract could not go against the seized property, although deprived of his remedy of attachment, which he otherwise might have been able to invoke.

But, as we have pointed out, Congress drew a line,—and the only question is, what claims possessed by non-enemies against enemies were included. Congress undoubtedly did not provide for those who had claims arising out of torts committed by enemy aliens. We do not believe that our opponents would contend that the word "debts", as used in Section 9, was meant to cover claims arising *ex delicto*. They rely very much upon the decisions under the National Bankruptcy Act, as upholding that broad interpretation of the word "debts", which they urge should be adopted in construing the Trading-with-the-Enemy Act. But even under the National Bankruptcy Act, it has been decided that claims for damages based upon mere torts are not provable debts. In *Schall* v. *Camors*, 251 U. S. 239, where the question was rather recently passed upon by this Court in connection with claims for damages for deceit, Mr. Justice Pitney said, at pages 250-251:

> "Can it be supposed that the present act *was intended to depart so widely from the precedents* as to include mere tort claims among the provable debts? Its 63d section

does not so declare in terms, and there is nothing in the history of the act to give ground for such an inference."

* * * * * * *

"Evidently the words of the section were carefully chosen; and *the express mention of contractual obligations naturally excludes those arising from a mere tort.* Since claims founded upon an open account or upon a contract express or implied often require to be liquidated, some provision for procedure evidently was called for; clause b fulfills this function, and would have to receive a strained interpretation in order that it should include claims arising purely *ex delicto.* Such claims might easily have been mentioned if intended to be included. Upon every consideration, we are clear that claims based upon a mere tort are not provable."

(*Italics* are ours unless otherwise indicated.)

See also *Brown & Adams* v. *United Button Co.*, 149 Fed. 48, holding that a claim for damages for negligent injury to personal property is not a "debt" provable in bankruptcy; and the authorities cited in 2 *Collier on Bankruptcy*, 977.

Aside from the Bankruptcy Act, courts have had no hesitancy in saying that a tort claim for damages is not a debt. The following quotation gives the gist of the decision in *Heacock & Lockwood* v. *Sherman*, 14 Wend 59, 60; (Italics are the Court's).

"*Damage* arising upon *tort* is not a *debt accrued* within any reasonable construction of that term. It is apparent * * * from a view of the whole section * * * that the intent of the framers of it was only to make the stockholders individually responsible for the *debts* of the company."

In *Norwich Pharmacal Co.* v. *Bennett,* 205 App. Div. 749, it was held that an action against a common carrier for damages for injury to and loss of goods in transit, was not such a claim as would allow recovery of a summary judgment under Civil Practice Rule 113, because it was not either a "debt" or a "liquidated demand arising on a contract". The Court, per Hinman, J., pointed out that Rule 113 should be taken to use the word "debt" in its ordinary common law signification and said, at page 752:

> "The action of debt at common law was an appropriate remedy to enforce a bill or note, an account stated and obligations of record such as a judgment. The term "debt" was also considered at the common law as including those obligations upon which *indebitatus assumpsit* would lie "as for use and occupation, or for real property sold, or goods sold, or for personal services, or for money loaned, paid, had and received, or for interest, or for some other pre-existing debt on simple contract, incurred at the defendant's request." (1 Chitty Pleading (16th Am. ed), 352). The term "debt" was also considered at common law as including a demand upon a *quantum meruit* for work, labor and materials furnished and upon a *quantum valebat* for goods sold and delivered. *We think the idea of a debt is that it is founded on a contract,* express or implied, to pay money in a certain sum or which can readily be reduced to a certainty *as distinguished from a claim for damages arising out of a breach of contract or the violation of some duty.*"

Federal Courts have drawn, with equal clarity, the same sharp line between tort claims and debts. In *Brun* v. *Mann,* 151 Fed. 145, which construes

the Act of March 4, 1896, 12 Stat. 393, exempting homesteads from any "debt contracted" previous to their acquisition, the Circuit Court of Appeals from the 8th Circuit, unanimously decided that a judgment, based upon a tort, was not within the statute, although the court granted that the Homestead Law was beneficial and should be liberally construed. In deciding the question, and holding that the liability for torts was not covered by the exemption from "debts contracted", the Court said, in part, at pages 155-156:

> "The line of demarcation between the two great classes of liabilities of parties, between liabilities created by agreement or by consent, and liabilities created by torts, can *never be absent* from the minds of those members of Congress whose duty it is to criticise, amend and perfect its acts. * * * The terms 'liability incurred' and 'debt contracted' are equally familiar. * * * These terms and their meanings could not have failed to occur to those who drafted, or to those who passed, the acts of Congress under consideration, and their rejection of the familiar and broad term 'liability incurred' and their selection and adoption of the limited expression 'debt contracted', is a demonstration that they had no purpose to exempt the lands they gave from liability for the wrongs which the patentees might have perpetrated."

Under the Trading-with-the-Enemy Act itself, the court, in *Norris* v. *Bergdoll*, 283 Fed. 981, 984, endeavored to distinguish the case of *W. S. Tyler Co.* v. *Alien Property Custodian*, 276 Fed. 134, on the ground that the latter case "was ruled upon

the distinction between a debt and a money liability for a tort." Although the court in the *Bergdoll* case was, we submit, mistaken as to the nature of the claim considered in the *W. S. Tyler Co.* case, it nevertheless was correct in its assumption that Sec. 9 of the Trading-with-the-Enemy Act was not intended to cover "a money liability for a tort."

So even if this "injustice" line of reasoning be adopted, it was equally unjust to our citizens who had meritorious tort claims to deprive *them* of their remedy by attachment.

For, at the time Congress passed this particular statute, the remedy of attachment could ordinarily have been invoked by those whose claims arose *ex delicto* just as well as by those who had claims for damages based upon contracts. Turn to the early attachment statute decisions cited by our learned opponents, and then regard the attachment statutes of those states in force at the time of the passage of the Trading-with-the-Enemy Act. It appears that, at the time the statute under consideration was enacted, those who had claims arising *ex delicto* were placed upon the same basis as those who had claims arising *ex contractu,* in nearly every instance.

Conn. Genl. Stat. (1918) Sec. 5861. Derived from Sec. 826, R. S. of 1902, reads in part, as follows:

> "Attachments may be granted upon all complaints containing a money demand against the estate of the defendant, and for want thereof against his body; *provided* no attachment shall be granted *against the body* in any *tort* action unless etc."

1 Code of Georgia (1911) Sec. 5069, contains even more explicit language:

> "In all cases of money demands, whether arising *ex contractu* or *ex delicto,* the plaintiff shall have the right to sue out the attachment when the defendant," etc.

Ann. Code of Maryland, p. 219, Art. 9, Sec. 44, likewise provides:

> "Attachments may also be issued in actions against non-resident or absconding debtors in cases arising *ex contractu* where the damages are unliquidated and in actions for wrongs independent of contract."

Genl. Stat. Minn. (1913), Sec. 7845:

> "In actions for the recovery of money other than for libel, slander, seduction, breach of promise of marriage, false imprisonment, malicious prosecution, or assault and battery, the plaintiff at the time of issuing the summons or at any time thereafter may have the property of the defendant attached in the manner hereinafter provided * * *".

Rev. Stat. Nebr. (1913), Sec. 7732:

> "The plaintiff, in a civil action for the recovery of money, may, at or after the time of the commencement thereof, have an attachment against the property of the defendant, and upon the grounds herein stated: * * * But if the demand *is not* founded on contract, the original petition must be presented to some judge * * * who shall make an allowance thereon in the value of the property that may be attached * * *".

New York Civ. Prac. Act, Sec. 902, provides for attachments upon causes of action arising upon "an injury to person or property in consequence of negligence, fraud or other wrongful act", or upon a "wrongful conversion of personal property." (Same as Sec. 635, former Code Civ. Proc.)

See also, to much the same effect, *3 Gen. Code of Ohio* (1921), Sec. 11819, the source of which was *Rev. Stat., Sec. 5521; 2 Code of Virginia* (1919), Sec. 6378, the source of which was Code of 1887, Secs. 2959, 2964, L. 1891-2, p. 520; and *1 Rem. Comp. Stat. Washington,* Sec. 648, Subd. 9 (Source L. 1886, p. 39, Sec. 2).

Attachment for various claims arising *ex delicto* is also permitted in many other states, the laws of which, inasmuch as no decisions from those states were cited by our learned opponents, we do not wish to prolong this brief by quoting.

In short, we submit, that it is apparent that Congress felt that it should draw a line, somewhere, concerning the nature of the claims which could be recovered out of the seized property, *while it remained under the protection of the government Custodian, as a trustee,* and that it does not work any injustice to hold that Congress, where it used the words "debts", meant to draw the line so as to exclude those who had claims based upon breaches of executory contracts.

Furthermore, there is no presumption that those non-enemies who had tort claims, or contract claims like that of the plaintiff, will not be fairly treated by the Congress. After the cases of those who claimed title to or an interest in the property, or who claimed to be creditors of the enemy aliens

are settled, there is no reason to suppose that Congress will not make adequate provision to permit those with tort claims and contract claims like plaintiff's to go against the property, either by attachment or otherwise, leaving the Alien Property Custodian out of the matter, except as a stakeholder, now that the former enemies are free to come here and prosecute or defend any actions that they may see fit.

III.

Concerning the questions of law raised by our opponents preliminary to a consideration of the merits.

Our learned opponents admit that this appeal is properly before this Court, but they make a point to the effect that this Court will only examine the record to determine whether "plain error" has been committed, citing and quoting from *Chicago Junction Ry. Co.* v. *King,* 222 U. S. 222.

We feel that we need to ask little more than that of this Court, for "plain error" has been committed, but our learned opponents seem to overlook the fact that this case is here *on an appeal in equity.* The *King* case was before this Court on a writ of error. That in an appeal in equity the Court will consider the case made by the record and weigh the evidence, thus requiring a quite different consideration of the facts than does a case brought up by a writ of error, is a

principle established by the earliest decisions of this Court. In *Wiscart* v. *D'Auchy* (1796), 3 Dall. 321, 326, Chief Justice Ellsworth said:

> "It is to be considered, then, that the judicial statute of the United States speaks of an appeal and of a writ of error; but it does not confound the terms, nor use them promiscuously. They are to be understood, when used, according to their ordinary acceptation, unless something appears in the act itself, to control, modify or change the fixed and technical sense which they have previously borne. *An appeal is a process of civil law origin, and removes a cause entirely; subjecting the fact,* as well as the law, *to a review and retrial*: but a writ of error is a process of common-law origin, and it removes nothing for re-examination, but the law."

And as late as *Behn* v. *Campbell*, 205 U. S. 403, 407, Mr. Justice Moody made the same distinction, saying:

> "The defendant * * * has now brought a writ of error and asks this court to review the facts to the same extent that they would be reviewed on appeal. But this overlooks the vital distinction between appeals and writs of error which has always been observed by this court, and recognized in legislation. *An appeal brings up questions of fact as well as of law,* but upon a writ of error only questions of law apparent on the record can be considered, and there can be no inquiry whether there was error in dealing with questions of fact."

The appellee next contends that the lack of mutuality, which the appellants urge, may not be

availed of by the appellants. The fact is that the defense of lack of mutuality, which is merely another way of stating that there was no enforcible contract between the parties, was raised in the answer interposed to the second amended bill of complaint. (Rec., p. 55). It was litigated fully in the trial court. When the case reached the Circuit Court of Appeals, the present appellee for the first time made the contention that this defense was not available to the present appellants. We do not know what could have occasioned the confusion in the mind of the Circuit Court of Appeals which led it to state that nothing had been said about the lack of mutuality until the appeal. (Rec., p. 664.) It may well be that the appellee is right in its assumption, stated in a foot-note on page 86 of its brief, that the Circuit Court of Appeals must have meant that nothing had been said about lack of mutuality until the suit was brought. (This seems a reasonable explanation because, of course, having pleaded it in the defense to the suit, the Court would be entirely without any basis to state otherwise.) It may be, however, that the Circuit Court of Appeals was confused in respect of this very important matter and assumed the fact to be as they stated, that no claim of lack of mutuality was made until the appeal. That puts a very different face upon the situation, and we would be inclined to feel that the Circuit Court of Appeals would have had much more justification for refusing to deal effectively with the claim of lack of mutuality, if the appellant had delayed bringing that point forward until the appeal.

But these questions and points have all been gone over in our principal brief: where we show that in the *Grimwood* case or cases the judgment actually was in favor of the defendant Munson Line; therefore the remarks of the court were *dicta*. In the *Luchenbach* case (267 Fed. 676), [the only other decision cited by the appellee, dealing in any way with lack of mutuality], the defendant Luchenbach S. S. Co. had not even pleaded lack of mutuality in its answer.

We submit that the other cases, dealing with other possible defenses which defendants failed to raise, are not authorities for the proposition that lack of mutuality, properly pleaded, is not available as a defense.

On principle, "lack of mutuality" is only another way of saying that there was actually no contract. Is a party who has actually never made a contract to be held liable because he does not raise the point the instant a dispute arises?

A father promises in writing to give his son one thousand dollars in a week. The week passes without his having done so. The son demands the money, but the father refuses on the sole ground that he cannot afford to let his son have it. The son sues him. Is it possible that the father would not be allowed to plead that there was no consideration for his promise?

The above discussion, of course, omits all reference to Beer, Sondheimer's letter of April 6, 1915 (Rec., p. 615, Exh. "O"), printed in full on pages 12 and 13 of our principal brief. This letter, we submit, speaks for itself. It shows that

Beer, Sondheimer & Co. at that early date, objected to the contract, because, as they stated, the representative of the Mammoth Company, Mr. Lyon, had taken the position that the latter was entirely free to refrain altogether from shipping any ore, or to ship as it might desire. We admit that the technical phrase "lack of mutuality" was not used in that letter to convey the idea which its language, however, as indicated above, clearly imports.

IV.

Concerning the merits of this controversy.

(A) *THE CONTRACT LACKED MUTUALITY.*

In regard to our opponents' statement on page 92 of their brief that the contract called for the total production of an established enterprise—we admit that the price and the period of the alleged contract were sufficiently definite,—we merely ask this court to consider whether or not the Mammoth Company had an established zinc mine in September, 1914, when the contract was executed, in view of the following *uncontradicted* testimony of appellees' witness Metcalf, the mine superintendent (Rec., pp. 139-140).

> "Q. 34. You had found in your exploratory work there that there was a body of zinc ore?
> A. Yes, sir.

Q. 35. And about when was it discovered that there was a body of zinc ore there, that was worth while considering mining?

A. Early in 1914.

Q. 36. So that up to 1914, during the period of your incumbency in that office, it had not seemed that there was any zinc ore there that was worth mining, or was deemed worth while going into the mining of it as zinc ore?

A. We had not considered that there was any such.

Q. 37. Where did this body of zinc ore lie, by itself, or was it in any of the mines already opened?

A. It was close to our copper ore bodies, almost in contact with one of them.

Q. 38. But you continued, or you could have continued, could you not, to have mined your copper and paid no attention to your zinc ore at all?

A. In parts of the mine you could.

(Fol. 295.) Q. 39. Well, as a whole, there was no substantial interference with your mining, because there happened to be some zinc ore where you discovered it, was there?

A. No.

Q. 40. When you began to mine it in April, 1914, about what was your product then, your weekly or monthly production?"

[Objection by Mr. Sutro.]

"A. It had not hardly reached a stage where there was any weekly or monthly production.

Q. 41. Well, when did you first begin to really have what you might describe as a weekly and monthly production?

A. I would not say that we hardly reached that stage before possibly January, 1915.

Mr. Sutro: That question is compound. You say a weekly or monthly production? I

will object to the question on the ground that it is compound and misleading. It contains two elements.

Q. 42. When did you begin serious mining of the zinc ore?

A. As well as I remember we began stoping about January or February, 1915. Operations prior to that time had been in the way of development, determining how great the ore body was, and providing means for extracting the ore.

Q. 43. Then see if I understand you aright in regard to that: Up to about January, 1915, you were largely engaged in what I perhaps may correctly describe as exploratory work, to ascertain the quality and quantity of the zinc ore bed available; am I correct?

A. Yes, I would say that was correct.

Q. 44. And during that period you had what you might term a comparatively slight and incidental product of this ore?

A. Yes."

In view of the appellee's statement that the alleged contract called for the "total production" of the mine regardless of whether it was an established zinc mine or not, we feel called upon to refer once more to the "contract" itself. It read, as we have heretofore noted, "total production of zinc crude ore shipped from its properties" (Rec., p. 49). Our argument concerning the importance and significance of the words "shipped from its properties", appears on pages 54 to 57 of our principal brief.

Of course, *if* the important facts had been otherwise: *if* the Mammoth Company had had an established mine with a known average output, and

if the Mammoth Company had promised to sell all of its output to Beer, Sondheimer & Co., then the authorities cited and discussed on pages 93 to 99 of appellee's brief, might be in point. But they are not in point, as shown on pages 58 to 61 of appellant's brief, because the facts of this case do not "fit". Nor have we, nor counsel, yet been able to discover an authority holding that a promise to sell all the product which *might be shipped from a mine* which had "hardly reached the stage where it had any weekly or monthly production," was held to be a valid total output contract. Our learned opponents, on page 101 of their brief, create the impression that the *plans* of the "contemplated" picking plant (completed about half a year after the "contract" was executed) had been drawn when the "contract" was entered into. They cite page 148 of the Record, where Mr. Metcalf testified on that point as follows:

> "Q. 130. And there were blueprints of this plant prepared?
>
> A. Yes.
>
> Q. 131. And when were those blueprints prepared?
>
> A. Oh, right about that time.
>
> Q. 132. I know, but about what time, as nearly as you can place it?
>
> A. Oh, August or September.
>
> Q. 133. Or November or December or October, but which?
>
> A. I said I do not know just which.
>
> Q. 134. You are not prepared to state that there were in existence any blueprints of any such plant as that in August, 1914, are you?
>
> A. I am not prepared to say there were or were not.

Q. 135. You are not prepared to say there were any designs or blueprints for that in existence in October of 1914?

A. Yes, I am willing to say that there were in October (fol. 311). Q. 136. Well, let us go to September then; were there in September?

A. There may have been; I do not know.

We leave the Court to draw its conclusions whether Mr. Metcalf's testimony justifies a flat assertion that the "contemplated" picking plant, had reached even the blueprint stage when the alleged contract was entered into. Yet, for the zinc mine to have been operated as a commercial enterprise—that is, run at a profit—such a picking plant was essential (Metcalf's testimony, Rec., p. 147). On the whole, we submit that our assertion that the zinc mine was not an established business when the "contract" was executed is the only fair conclusion to be drawn from the evidence.

Even if the Mammoth Company had had an established zinc mine, it would still be necessary for the appellee to demonstrate, that the "contract" bound the Mammoth Company to ship all the ore which it produced in order to sustain the decisions of the Court that this was a valid "total output" agreement.

We believe that our principal brief (pages 58 to 62 and pages 64 and 65) covers sufficiently all the authorities cited by our learned opponents with a view to sustaining the holding that this alleged agreement did call for the total production of the zinc mine.

As our opponent's argument is on the same lines, and relies on virtually the same authorities as the opinion of the Circuit Court of Appeals, we feel that no further extensive consideration need be given to it here.

The additional authorities brought to the attention of this Court by counsel for the appellee, like those cited and relied upon below, deal with cases in which material facts were present which are conspicuously absent from this case; namely:

(a) *unequivocal* promises to sell *total* output or to buy *all* requirements.

(b) prior and *extensive* dealings between the parties.

(c) the possession by the seller of a known and *measurable established* business.

For these reasons, we submit, that on their own showing, these authorities are not in point. Furthermore, we submit that the latest views of the Court of Appeals of New York, *concerning contracts of the nature of the one at bar,* are not found in *Wood* v. *Lucy,* 222 N. Y. 88, cited by our learned opponents on page 113 of appellee's brief, but, rather, are clearly expressed and expounded in *Schlegel Mfg. Co.* v. *Cooper Glue Factory,* 231 N. Y. 456, cited and discussed on page 73 of our principal brief.

Furthermore, we cannot agree, with our learned opponent's statement on page 125, that a question of the proper interpretation of a written instrument is one of fact, especially where it is the instrument upon which the action is brought. Nor, for the reason that this is an appeal in

equity, can we agree that this Court should feel in any way obliged to follow the decisions below upon the meaning to be given to the phrase "shipped from its properties."

The brief for the appellee, pages 117 to 119, contain an argument from the evidence, to the effect that business reasons would incline the Mammoth Company to continue production, once it had started work on the zinc ore body.

But, as we pointed out, there was *no* proof that the Mammoth Company was required, from business reasons, to *ship* all the ore that it mined. If there had been any such business reason or necessity, how could Mr. Metcalf have sent the telegram stating that "with spelter quotations below five *shipments* will be very light" (Rec., p. 615, Ex. O). This seems to indicate that Mr. Metcalf, the general manager of the company, did not see any business connection between the necessity of continuing mining and the shipping of the product which resulted from such mining.

Finally, we merely wish again to call the attention of the Court to the fact that this alleged contract was prepared by the Mammoth Company, notwithstanding our learned opponents' statement to the contrary, based on Salinger's mistake as to what Beer Sondheiner's New York Office had done to its wording. See our principal brief, pages 65 to 66.

The appellee contends, on pages 126 to 131, that the construction of the "contemplated" picking plant was the consideration for this alleged contract (Rec., pp. 48-49). The construction of this picking plant was only contemplated when

the agreement was signed; and the only reference to the picking plant, is in that part of the alleged contract which relates to the period for which the agreement was to be operative. This period was to run one year from the completion of the contemplated picking plant, but in no event longer than eighteen months from the date of execution of the contract. *The agreement, however, took effect upon execution* (Appellee's brief, p. 126, Rec., pp. 49-50). According to the appellee, it sprang into existence as a valid contract, binding on *both* parties, as soon as it was signed. We agree, that, if there were any contract at all, it became mutually binding upon execution. That being the case, the subsequent erection of the picking plant, which counsel must admit the Mammoth Company *did not promise* to build, could not possibly have been the consideration for the contract. In that class of cases, cited by our learned opponents on pages 128 to 130 of their brief, the subsequent act is the consideration for the promise, but until that act is performed neither party is obligated or bound. The promisor remains merely under a liability to become bound, until the promisee performs the act; and the promisee is not bound to perform the act. This class of contracts is sometimes defined as "unilateral". *1 Williston on Contracts,* Sec. 13.

But in the case at bar, our learned opponents claim that *both* parties were bound *before* the picking plant was ever erected. Therefore, the subsequent erection of the picking plant cannot be the act or consideration which bound Beer, Sondheimer & Co. to accept ore as soon as the

contract was executed. In short, it was not the consideration, either in fact or in the intention of the parties.

The validity of the other suggested "considerations" urged by counsel on pages 131 to 136, have been considered and dealt with in our principal brief (pp. 62-67).

(B) *THE MAMMOTH COMPANY WAS GUILTY OF A PRIOR BREACH OF THE CONTRACT.*

We believe that the question of prior breach of contract by the Mammoth Company is covered by Point III of our principal brief (pp. 79-92). We wish, however, to call the especial attention of this Court to the table of the shipments made by the Mammoth Company, found on page 83 of our brief, in considering whether the ore was shipped "in as near as possible equal weekly quantities", as was required by that contract (Rec., p. 50). The correctness of this table is not questioned by counsel, except that they claim that the first three and the last three items should have been omitted. We have no objection to such a proposition. All we ask this Court to consider are the shipments made between September 23rd, 1914 and March 24th, 1915. Our opponents seek to explain the *inequality* of the shipments up to March 5th, 1915, on the ground that the picking plant had not been theretofore completed. Although this may explain why the shipments were *less* than after its completion, we submit that it does not explain why the shipments, such as were made, were not *equal*.

Our opponent's main contention is that this defense of prior breach is not open to the appellants. The principal reason given (pp. 141 and 149) is that Beer, Sondheimer & Co., in first complaining about the great increase in the shipments, (Pl. Exch. 53, Rec., p. 465) used the word "monthly" instead of "weekly". This we think is, on its face, clearly without merit.

(C) *THE CONTRACT IN SUIT IS AGAINST PUBLIC POLICY.*

Little further need be said in reply to that part of appellee's brief which deals with this point. The evidence of the practical identity of the two co-subsidiaries, the Mammoth Company and the United States Smelting Company, is clearly brought out in our principal brief. Also, the fact that Mr. Metcalf, the Mammoth mine manager, was forced to admit that he knew about the "arrangement" between the United States Smelting Co. and the American Metal Co., *at the time it was entered into,* is shown by pages 140 and 141 of the Record. However, our learned opponent's contend that the contract between the co-subsidiary and the American Metal Co., did not cover the product of the Mammoth Zinc Mine. But the way in which the Record shows that the contract of June 10th, 1914, made with the American Metal Company, *expressly* covered the product of the Mammoth Company's Zinc Mine, is pointed out in our brief. In regard to what the parties to the American Metal Co. contract intended it to cover, and in opposition to Eardley's subsequent testi-

mony on that point, the telegram of Mr. Putzel, of the American Metal Co., sent *at the time he was negotiating the contract,* is very important. This telegram is referred to on page 98 of our brief, and read as follows (Sec., p. 652):

> "Think can close with Eardley output of Midvale Table produce and Kennett crude for two (2) or three (3) years at Needles terms pleased wire whether satisfactory and for what period.
>
> June, 1914.
>
> Telegram from Putzel to New York."
>
> ("Kennett crude" refers to ore from Kennett,—the Mammoth Company's mine.)

(D) *THERE WAS NO ACTUAL RESALE LOSS.*

We feel that our learned opponents misunderstand the contention that we make in our Point V (Brief, pp. 104-111). We do not mean that the Mammoth Company was not credited on the books of the parent corporation with a fair price for the ore that it delivered to its co-subsidiary.

We meant only to point out that the whole transaction was between units of the same parent company, and that, therefore, the *profits* which were made by the United States Smelting Company on this ore should be taken into account before any damages are awarded. This argument, we admit, is based on the premise that the Mammoth Company and the United States Smelting Company were in actuality but parts of the parent United States Smelting, Refining and Mining Company. The evidence to support this contention is ample,

as Point V of our brief demonstrates (Br., pp. 104-107). That being the case, the rule laid down by the authorities there cited (Br., pp. 108-110) require a reversal herein for the failure of the Courts below to take this element of profit into consideration.

(E) *THE ALLOWANCE OF INTEREST WAS ERRONEOUS.*

We believe that the allowance of any interest herein was incorrect and improper for the reasons set forth in Point VI of our principal brief, especially for the reason that interest is not allowed against the Government, in the absence of an express special provision by Congress to that effect. The authorities which so hold are numerous. The leading cases are cited on page 118 of our brief.

The rule cannot be successfully disputed. As was pointed out in *United States* v. *North American Co.*, 253 U. S. 330, 336, the provisions of Sec. 177 of the Judicial Code, forbidding the allowance of interest in the Court of Claims, were merely an express enactment of the common law. This Court also held in that case, as was pointed out on page 337, that the allowance of interest in condemnation proceedings, is no violation of the rule that interest is not allowed on claims against the Government, because in such proceedings the landowner is not suing the United States to collect a claim, but is a defendant in a suit instituted by the Government. Furthermore in condemnation proceedings, this Court said, interest is not allowed as damages. So we submit that the cases on pages

181-182 of appellee's brief, for the above reasons, are not relevant.

We also submit that none of the authorities cited in behalf of the appellee overcome the other valid objections to the allowance of interest set forth in our brief. The authorities on pages 178 to 179 of appellee's brief were merely cases where an agency to *receive* money was held not to have been revoked by the outbreak of war. The different rule which applies where the agent would be called upon to *pay out* money, is discussed on pages 130 to 131 of our main brief.

A vital question, then, was whether this suit was against the United States. If it were, there was no need to go into the other questions considered in our Point VI. We advanced the case of *United States ex rel Angarica* v. *Bayard,* 127 U. S. 251, as a precedent which strongly supported the view that suits brought under Section 9, were against the Government, and that interest should not be allowed.

However, the recent decision of this Court in *Banco Mexicano etc.* v. *Deutsche Bank et al,* 44 Sup. Ct. Rep. 209 had not been called to our attention. We submit that that case, wherein this Court held that a suit against the Alien Property Custodian under Sec. 9 of the Trading-with-the-Enemy Act, was a suit against the United States, settled the point here in dispute. It is scarcely necessary to recall that Mr. Justice McKenna, in concluding his opinion in the *Banco Mexicano* case, said:

> "We are constrained to this because we agree with the Court of Appeals that this suit

is in effect a suit against the United States and all of its conditions must obtain."

The Court of Appeals had said, upon this point, (289 Fed. 924, 929):

> "This is in effect a suit against the United States. The rule is well established that, when the United States permits itself to be sued in its own courts, the terms of the permission must be strictly followed, and the suitor here is an alien, although not an alien enemy, and while it is to be presumed that the United States will not confiscate the property now in the hands of the Alien Property Custodian, nevertheless it is the duty of the Custodian to defend his possession according to law, *until Congress determines what disposition it will make of the property.*"

Since the Trading-with-the-Enemy Act contains *no express provision* allowing interest in suits brought under Section 9, we submit that the allowance of any interest whatsoever was erroneous. The fact that Congress directed the suits to be brought on the equity side of the District Court is not sufficiently definite to justify an inference that interest was to be allowed. We submit that the provision requiring the suits under Section 9 to be in equity was inserted merely for purposes of convenience and speed in handling the claims—in other words, to dispense with a jury.

Conclusion.

For the reasons and arguments above set forth, we submit that the able brief of counsel for the appellee herein, has not succeeded in overcoming the arguments advanced in our principal brief, to which, in connection with what has been presented above, we refer for our conclusion that **the decree of the Circuit Court of Appeals, modifying the decree of the District Court and affirming the same as modified, should be reversed and the case remanded with directions that the bill of complaint be dismissed with costs in all courts, or, at least, the decree should be modified by reducing the amount of damages as indicated in Point V of our principal brief, and/or by the amounts awarded thereon as interest.**

Respectfully submitted,

JAMES M. BECK,
Solicitor General.
LINDLEY M. GARRISON,
ADNA R. JOHNSON, JR.,
DEAN HILL STANLEY,
Special Assistants to the Attorney General
Solicitors for the Defendants-Appellants.

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